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**BEFORE THE
RESPIRATORY CARE BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA**

In the Matter of the Petition to Revoke Probation
Against:

KIM M. CUNNINGHAM
7900 X Croy Road
Morgan Hill, CA 95037

Respiratory Care Practitioner License No. 16251

Respondent.

Case No. R-2050

OAH No. Unassigned

**ACCUSATION AND PETITION
TO REVOKE PROBATION**

Complainant alleges:

PARTIES

1. Stephanie Nunez (Complainant) brings this Accusation and Petition to Revoke Probation solely in her official capacity as the Executive Officer of the Respiratory Care Board of California, Department of Consumer Affairs.

2. On or about May 26, 1993, the Respiratory Care Board issued Respiratory Care Practitioner License No. 16251 to Kim M. Cunningham (Respondent). The license was in effect at all times relevant to the charges brought herein, and will expire on September 30, 2008, unless renewed.

3. In a disciplinary action entitled "In the Matter of Accusation Against Kim M. Cunningham," Case No. R-1884, the Respiratory Care Board, issued a decision, effective

1 October 18, 2004, in which Respondent's Respiratory Care Practitioner License was revoked.
2 However, the revocation was stayed and Respondent's license was placed on probation for a
3 period of three (3) years with certain terms and conditions. A copy of that decision is attached as
4 Exhibit A and is incorporated by reference.

5 **JURISDICTION**

6 4. This Accusation and Petition to Revoke Probation is brought before the
7 Respiratory Care Board (Board), Department of Consumer Affairs, under the authority of the
8 following laws. All section references are to the Business and Professions Code unless otherwise
9 indicated.

10 5. Section 3718 of the Code states: "The board shall issue, deny, suspend,
11 and revoke licenses to practice respiratory care as provided in this chapter."

12 6. Section 3753.5, subdivision (a) of the Code states:

13 "In any order issued in resolution of a disciplinary proceeding before the board,
14 the board or the administrative law judge may direct any practitioner or applicant found to
15 have committed a violation or violations of law to pay to the board a sum not to exceed
16 the costs of the investigation and prosecution of the case. A certified copy of the actual
17 costs, or a good faith estimate of costs where actual costs are not available, signed by the
18 official custodian of the record or his or her designated representative shall be prima facie
19 evidence of the actual costs of the investigation and prosecution of the case."

20 7. Section 3753.7 of the Code provides that for purposes of the Respiratory
21 Care Practice Act, costs of prosecution shall include attorney general or other prosecuting
22 attorney fees, expert witness fees, and other administrative, filing, and service fees.

23 8. Section 3753.1 of the Code states:

24 "(a) An administrative disciplinary decision imposing terms of probation may
25 include, among other things, a requirement that the licensee-probationer pay the monetary costs
26 associated with monitoring the probation.

27 9. Section 3750.5 of the Code states, in relevant part:

28 "In addition to any other grounds specified in this chapter, the board may deny,

suspend, or revoke the license of any applicant or license holder who has done any of the following:

"(a) Obtained or possessed in violation of law, or except as directed by a licensed physician and surgeon, dentist, or podiatrist administered to himself or herself, or furnished or administered to another, any controlled substances as defined in Division 10 (commencing with Section 11000) of the Health and Safety Code, or any dangerous drug as defined in Article 2 (commencing with section 4015) of Chapter 9.

"(b) Used any controlled substance as defined in Division 10 (commencing with Section 11000) of the Health and Safety Code, or any dangerous drug as defined in Article 2 (commencing with section 4015) of Chapter 9.

FIRST CAUSE FOR DISCIPLINE

(Illegal Use of Controlled Substance)

10. Respondent is subject to discipline for violation of Business and Professions Code section 3750.5 (a) and (b), in that chemical analysis of the body fluid sample Respondent provided for testing pursuant to her probationary conditions indicated the presence of cannabinoids/THC, indicating marijuana use. Such use is also a violation of Respondent's probationary conditions (see "Second Cause to Revoke Probation, below). The circumstances are as follows:

11. On or about September 23, 2006 Respondent reported as directed for biological fluid testing, as required by the conditions of her probation. The test results revealed the presence of cannabinoids/THC, indicating the illicit use of marijuana.

12. On or about December 12, 2006, Respondent reported as directed for biological fluid testing, as required by the condition of her probation. The test results revealed the presence of cannabinoids, ethyl glucuronide, and benzodiazepines.

FIRST CAUSE TO REVOKE PROBATION

(Biological Fluid Testing)

13. At all times after the effective date of Respondent's probation, Condition Two of the terms and conditions set out by the Decision and Order in this matter requires Respondent to participate in random biological fluid testing.

14. Respondent's probation is subject to revocation because she failed to comply with Probation Condition Two, referenced above. The facts and circumstances regarding this violation are as follows:

Respondent failed to call the testing schedule inquiry number as required on November 25, 2004; August 18 and 21, 2005; October 8, 2005; May 18, 2006; June 16, 2006; September 11, 2006; October 21, 2006; November 12, 25, 2006, and December 2, 2006.

SECOND CAUSE TO REVOKE PROBATION

(Abstention From Use of Any and All Mood Altering Substances)

15. At all times after the effective date of Respondent's probation, Condition Three of the terms and conditions set out in the Decision and Order in this matter requires Respondent to abstain entirely for the possession or use of alcohol and other mood altering drugs unless properly prescribed by a health care practitioner.

16. Respondent's probation is subject to revocation because she failed to comply with Probation Condition Three, referenced above. The facts and circumstances regarding this violation are as follows:

Chemical analysis of the body fluid Respondent provided for testing on February 3, 2005 indicated the presence of ethyl glucuronide, a metabolite of ethyl alcohol. Chemical analysis of the body fluid Respondent provided for testing on September 23, 2006 yielded a positive result for the presence of cannabinoids/HC, indicating marijuana use. Similar analysis on December 12, 2006, again revealed the presence of cannabinoids and ethyl glucuronide, as well as benzodiazepines.

1 **THIRD CAUSE TO REVOKE PROBATION**

2 (Supervisor Quarterly Reports of Performance)

3 17. At all times after the effective date of Respondent's probation,
4 Condition Five of the terms and conditions of her probation as set out in the Decision and Order
5 in this matter requires Respondent to ensure her employer submits quarterly reports of her
6 performance.

7 18. Respondent's probation is subject to revocation because she failed to
8 comply with Probation Condition Five, referenced above. The facts and circumstances regarding
9 this violation are as follows:

10 Respondent failed to submit the supervisor quarterly report for the period July 1-
11 September 30, 2006, due by October 7, 2006 and for the reporting period of October 1 -
12 December 31, 2006, due by January 7, 2007.

13 **FOURTH CAUSE TO REVOKE PROBATION**

14 (Quarterly Report of Compliance)

15 19. At all times after the effective date of Respondent's probation,
16 Condition Seven of the terms and conditions of her probation as set out in the Decision and
17 Order in this case requires Respondent to file quarterly report forms with the Board.

18 20. Respondent's probation is subject to revocation because she failed to
19 comply with Probation Condition Seven, referenced above. The facts and circumstances
20 regarding this violation are as follows:

21 Respondent failed to submit the quarterly report of compliance for the period of July 1-
22 September 30, 2006, due by October 7, 2006 and for the reporting period of October 1 -
23 December 31, 2006, due by January 7, 2007.

24 **FIFTH CAUSE TO REVOKE PROBATION**

25 (Probation Monitoring Costs)

26 21. At all times after the effective date of Respondent's probation,
27 Condition Nine of the terms and conditions set out by the Order and Decision requires
28 Respondent to make timely and regular payment for all costs incurred for probation monitoring

1 during the entire period of probation.

2 22. Respondent's probation is subject to revocation because she failed to
3 comply with Probation Condition Nine, referenced above. The facts and circumstances regarding
4 this violation are as follows:

5 Respondent's payments to the Board for costs of probation monitoring are in
6 arrears in the amount of \$2,325.45 as of January 2007.

7 **PRAYER**

8 WHEREFORE, Complainant requests that a hearing be held on the matters herein
9 alleged, and that following the hearing, the Respiratory Care Board issue a decision:

10 1. Revoking the probation that was granted by the Respiratory Care Board of
11 California in Case No. R-1884 and imposing the disciplinary order that was stayed thereby
12 revoking Respiratory Care Practitioner License No. 16521 issued to Kim M. Cunningham;

13 2. Revoking or Suspending RCP License No. 16251 issued to Kim M.
14 Cunningham;

15 3. Ordering Kim M. Cunningham to pay the Respiratory Care Board the costs
16 of the investigation and enforcement of this case, and if probation is continued or extended, the
17 costs of probation monitoring; and

18 4. Taking such other and further action as deemed necessary and proper.
19

20 DATED: January 23, 2007
21

22
23 Original signed by Liane Zimmerman for:
24 STEPHANIE NUNEZ
25 Executive Officer
26 Respiratory Care Board of California
27 Department of Consumer Affairs
28 State of California
Complainant